Commissioners but contended that these facts established clearly a case of capital appreciation. But on the evidence the tax-payer was more a timber man than he was of any of his other occupations. From his own accounts for the years 1964 to 1966, 90% of his income was derived from timber operations. Whatever his stated reasons for the purchase of the property might be, there was no evidence that he carried out in any way his projected cattle rearing on the property. From the figures supplied by Kim Hong Co. Ltd., there could be no doubt of the suitability of the property as a logging concession. There was also some timber in the parts subject to flooding. The tax-payer had applied for and obtained a timber licence. His surrender of it was in conformity with the law, since under the Forest Ordinance 1954 and the Forest Rules 1954, such a licence was not transferable and the only way Kim Hong Co. Ltd. could work the land for its timber would be to apply for a licence in its own name and he could only do that after the tax-payer had surrendered his licence. On the evidence it was a possible conclusion that the sale to Chin Yin Kee was a colourable device and that the sale was one to a logging firm. There was ample evidence before the Special Commissioners to come to the finding that the difference in the consideration was not a capital appreciation but a profit arising from the tax-payer's trade and therefore chargeable to tax. The learned judge also accepted this and it will be wrong for this court to come to any other conclusion.

The last question concerned the sum of $23,703 made up of $11,600 commission, $500 legal fees and $11,603 transfer fees. Because of the intervention of Chin Yin Kee, the Special Commissioners were not satisfied that the sum was wholly and exclusively incurred in the production of the income: Section 12(1) Sabah Income Tax Ordinance 1956, to qualify for deduction. We agree.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Chong Thian Vun & Co.*

NAM SENG CO. v. WING YEW (TAWAU) CO. SDN. BHD.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo), and Chang Min Tat F.J.) April 24 and June 19, 1978]

[Kota Kinabalu — Federal Court Civil Appeal No. 218 of 1977]

Contract — Assignment of forest licence — Breach of Enactment — Illegal and void — Forest Enactment, 1968 — Forest Rules, 1969.

In this case the appellant who was the third plaintiff in the civil action claimed to be the assignee of a forest licence granted to first defendant. The respondent was similarly an assignee whom the first defendant, the licensee, purported to substitute in place of the appellant. The appellant and two others had sued the respondent and two others and the respondent had applied for the writ of summons and the action to be dismissed on the ground, *inter alia*, that the claim was based on an illegal contract. The learned judge was of the opinion that the assignment of the licence was in breach of the Forest Enactment 1968 and the Forest Rules 1969 and therefore illegal and void. He therefore made the order dismissing the action. The appellant appealed.

Held: dismissing the appeal, the learned trial judge was correct in holding that the purported assignment of the forest licence was illegal and void and therefore that the action should be dismissed.

Cases referred to:-

(1) *Finnegan* v. *Cementation Co. Ltd.* [1953] 1 All E.R. 1130.

(2) *Pontin* v. *Wood* [1962] 1 All E.R. 294.

(3) *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.* [1971] 2 M.L.J. 161.

FEDERAL COURT.

W.K. Loo for the appellant.

Shelley Yap for the respondent.

Lee Hun Hoe C.J. (Borneo) (read by Charles Ho J.): This is an appeal against an order made by the learned judge that the writ of summons and service thereof and all subsequent proceedings against respondent/3rd defendant be set aside and the action dismissed with costs to be taxed on the ground of illegality.

Syarikat Perjuangan Sdn. Bhd. (1st defendant) were granted a licence No. 14/71 issued by the Sabah Government on November 1, 1971 covering a concession area of 20,000 acres in the Bongaya Forest Reserve, Sandakan. Datuk Chang Hwee Ming (1st plaintiff) is the Chairman and Managing Director of Nam Seng Co. Sdn. Bhd. (2nd plaintiff) and also the sole proprietor of Nam Seng Co. (appellant/3rd plaintiff). On April 10, 1972 1st defendant executed three documents. The first is the Power of Attorney ("old P/A") in favour of 1st plaintiff which was registered in the Magistrate's Court, Sandakan on April 11, 1972 as No. 276/72. The "old P/A" empowers the 1st plaintiff to do certain acts and things on behalf of 1st defendant under the licence. The second is the Timber Extraction Agreement ("old T.E.A.") whereby 1st defendant employed 2nd plaintiff to extract all merchantable timber from the concession area. The third is the Timber Sale Agreement ("old T.S.A.") whereby 1st defendant agreed to sell all merchantable timber extracted from the concession area to 3rd plaintiff. On August 20, 1975 the 1st defendant company at the meeting of its board of directors passed a resolution terminating the "old P/A" and determining the "old T.E.A."

Under the "old T.E.A." 2nd plaintiff had extracted timber from an area of 9,000 acres in 1975. In the exercise of the powers under the "old P/A" 1st plaintiff had applied to the Forest Department for a further area for extraction of timber. A permit to enter Coupe No. S-43/74 was issued by the Forest Department on March 20, 1975 to 1st defendant to enter the Coupe consisting of 3,660 acres in the concession area and valid for a period of 3 years. The 1st plaintiff obtained the permit in order to allow 2nd plaintiff to continue with the extraction under the "old T.E.A." Upon the issue of the said permit, 2nd plaintiff had caused the area to be surveyed, divided the Coupe area into blocks, constructed roads and pangkalangs thus incurring expenses totalling $159,960. 1st defendant executed another Power of Attorney ("new P/A") in favour of 3rd defendant on August 30, 1975 and also entered into a new Timber Extraction Agreement ("new T.E.A.") to extract timber from the concession

area with Wing Yew (Sandakan) Co. Sdn. Bhd. (2nd defendant). On September 9, 1975 1st defendant entered into a new Timber Sale Agreement ("new T.S.A.") with 3rd defendant for the sale of those timber extracted from the concession area. As a result of these transactions the plaintiffs sued the three defendants.

It is to be observed that when 1st defendant granted the "new P/A" to 3rd defendant on March 30, 1975 the "old P/A" had not been revoked. Neither was notice given to 2nd and 3rd plaintiffs terminating the agreements. On September 17, 1975 1st plaintiff received a letter from Messrs. Shelley Yap & Co., solicitors for 1st defendant, enclosing a copy of Revocation of Power of Attorney dated September 9, 1975. The 1st plaintiff was notified that the revocation would take immediate effect upon receipt of the document.

Since September 1975, 2nd defendant had extracted timber on the concession area and 3rd defendant had removed the timber from the concession area for sale and export. Following complaint from plaintiffs, the Forest Department wrote to 2nd defendant on January 21, 1976 suspending the Coupe Permit No. S43/74 preventing extracting and removal of timber until further notice. On February 6, 1976 1st defendant wrote to the 2nd plaintiff advising that 1st defendant agreed to restore 2nd and 3rd plaintiffs as contractor and exporters and to stop 2nd defendant from working in the concession area. On February 27, 1976 a meeting was held in the Pejabat Hasil Bumi meeting room. Representatives of 1st defendant, 2nd plaintiff and 2nd and 3rd defendants were present. The Setiausaha Hasil Bumi advised the parties to settle the matter amongst themselves. Since the meeting 2nd and 3rd defendants continued their activities in the concession area.

In Civil Suit No. 302 of 1976, the three plaintiffs sued the three defendants. By a summons-in-chambers respondent/3rd defendant applied for an order that the writ of summons and service thereof and all subsequent proceedings against respondent/3rd defendant be set aside and action be dismissed on various grounds, *inter alia*, that the claim was based on an illegal contract.

It is the submission of 3rd plaintiff that if a writ is a nullity the court has inherent jurisdiction to set it aside as in *Finnegan* v. *Cementation Co. Ltd.*[1] where it was held that the writ was void *ab initio* and, therefore, the court would not take any step to validate proceedings which were *ab initio* defective. But, where the writ is not a nullity but there is an irregularity in the pleadings, the court will not set aside the writ. *Pontin* v. *Wood*[2] was cited. There the court held that the writ should not be set aside because it was merely defective in that the indorsement did not disclose the cause of action, which was a defect that was curable by a proper statement of claim. The learned judge said he rejected the objection not because he disagreed with the principle in *Pontin's case*,[2] but for the reason that one of the other grounds was based on illegality which, if proved, meant that the contract was void *ab initio* and consequently the writ would be a nullity. After considering the submissions of the parties, the learned judge held that there was a cause of action against 3rd defendant and that the claim was not frivolous and vexatious. However, he allowed the application of 3rd defendant on the ground of illegality and made an order in terms of the application and costs to 3rd defendant.

The learned judge was of the view that the licence was issued under section 24(1) of the Forest Enactment and not a licence agreement entered into between the Minister and the licensee under section 15 of the said enactment. He considered that the three documents in effect transferred the licence effectually to one person, the 1st plaintiff and thus constituted a breach of section 24(6) of the said enactment. Further, he considered himself bound by the decision of this court in *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.*[3] where it was held that a breach of section 24(6) of the said enactment was illegal and any claim based thereon could not be enforced and that the words "personal to holder and shall not be transferable in any manner whatsoever" were wide enough to include any form of assignment however disguised.

In the present case the licence was clearly stated to be subject to the conditions attached to the licence and the provisions of the Forest Enactment, 1968 and the Forest Rules, 1969. The enactment, repealing and replacing the Forest Ordinance (Cap. 169), came into operation on January 1, 1969 by virtue of the Sabah Government *Gazette* Notification No. 516 dated March 20, 1969. The concession area of 20,000 acres granted under the licence was in the Bongaya Forest Reserve.

Previously, a special licence would be issued under the Forest Ordinance (Cap. 169) and the Forest Rules, 1954. The special licence was different from an ordinary licence in that the special licence required the prior approval of the Minister and also the period could extend to ten years. (see rule 3(2) of the said rules). An ordinary licence in Form I was for a period of not exceeding one year and renewable for a similar period on each occasion. (See rule 4(1) of the said rules). But, for all purposes the provisions of the said rules were deemed to apply to a special licence as if it was a licence in Form I. (See rule 3(3) of the said rules). However, under the enactment there would seem to be two types of licences, that is to say, either a licence agreement entered into under section 15 or a licence issued under section 24 as defined under section 2.

Part I of the Enactment covers the first four sections dealing with preliminary matters. Section 2 of the enactment gives the following definitions:—

"'admitted right' means a right admitted in respect of a Forest Reserve by a reservation notice;

'alienated land' means any land in respect of which a registered title for the time being subsists under any written law relating to land title registration, land tenure or mining, or which has become in any manner vested in any person or authority other than the State;

'conceded privilege' means a privilege conceded in respect of a Forest Reserve by a reservation notice;

'Forest Reserve' means a Forest Reserve declared as such under section 12 of this Enactment;

"licence' means a licence issued under section 24 of this Enactment;

'licence agreement' means a licence agreement entered into under section 15 of this Enactment;

'reservation notice' means a notice declaring land to be a Forest Reserve, issued under subsection (1) of section 12 of this Enactment, as amended or modified by any notice affecting that Reserve made under section 13 or section 14 of this Enactment;

'State land' means all land in the State other than a Forest Reserve or alienated land."

Part II of the enactment, covering sections 5 to 22, deals with Forest Reserves. Section 15 is concerned with the acquisition of rights in a Forest Reserve. Section 16 prohibits the transfer of privileges except with the consent of the Minister. These sections read: —

"15. (1) Save as otherwise provided in this Enactment and notwithstanding the provisions of any other State law, no right of any description in or over a Forest Reserve or any part thereof shall be acquired except by virtue, and in accordance with the terms of a licence agreement entered into by the Minister or of a licence.

(2) Any licence agreement entered into by the Minister under this section shall be subject to any admitted rights or conceded privileges and any special conditions attaching to the Forest Reserve concerned under the provisions of this Enactment, but subject thereto, where any provision of such licence agreement is inconsistent with any provision of this Enactment compliance with the provisions of such licence agreement shall be deemed to be compliance with the provisions of this Enactment.

16. Notwithstanding anything in this Enactment or in any other written law, no admitted right or conceded privilege shall be transferred by way of grant, sale, lease, charge or other manner, except succession on death, without the written consent of the Minister."

Section 20 merely states that unless expressly authorised by or under the provisions of this enactment, a person shall be liable to a penalty for doing any of the various prohibited acts in a Forest Reserve.

Sections 23 to 28 form Part III which deals with general provisions as to Forest Produce, etc. Part IV contains sections 29 to 40 and is concerned with penalties and procedure. Part V covers the last three remaining sections dealing with miscellaneous matters. While section 20 deals with Forest Reserve, in the same way section 23 prohibits the doing of various acts on alienated land and State land. Sections 24(1) and (6) read: —

"24. (1) Subject to the provisions of this Enactment, the Conservator or any person authorized by him in that behalf may issue licences for the doing of all or any of the acts prohibited by sections 20 and 23 of this Enactment upon such conditions and subject to the payment of such fees or royalties (if any) as may be prescribed or as may be specified in such licence.

....

(6) A licence shall be personal to the holder thereof and shall not be transferable in any manner whatsoever, and shall cease to be valid on the death of such holder or if such holder is declared to be insolvent under the provisions of any written law."

It is very important to note the difference between sections 15 and 24. A licence issued under section 24 is personal to holder and not transferable in any manner whatsoever. Such a licence may be issued by the conservator or his representative and does not require a licensee to countersign on the licence. But, in the case of a licence agreement all parties concerned, including the Minister, are required to sign as if the licence were an agreement which contains various terms and conditions. Under rule 3 of the Forest Rules, 1969 such a licence shall be in one of three forms set out in Schedule III of the Rules. But, no prescribed form is provided for a licence agreement issued under section 15. A licence relating to the doing of any act in a Forest Reserve shall not, under section 24(3), be expressed as being valid for a period exceeding 5 years, and if by mistake or otherwise such licence is expressed to be valid for a longer period or contains no period of validity it shall cease to be valid at the expiration of five years from the date of issue thereof. Where a licence relates to the doing of any act on State land other than a Forest Reserve, section 24(4) states that it shall not, without the consent, either general or special, of the Director of Lands and Surveys, be valid for a period exceeding one year. It is to be noted that a subsection (7) has been added to section 24 recently by the Forests (Amendment) Enactment, 1976 stating that notwithstanding any provision of the enactment the Minister may, as and when he deems it necessary in the public interest, revoke or cancel a licence or licences issued prior to July 15, 1976. It would seem that a licence issued under section 24 may be liable to revocation or cancellation before the expiration of the period of such a licence under subsection (7) aforesaid. However, the new amendment does not seem to affect a licence agreement as it would result in an action for breach of contract involving substantial damages. The total prohibition against transfer relates to State land and alienated land but not Forest Reserve under a licence agreement. Under section 16 it is possible to transfer the benefits under the licence agreement with the consent of the Minister. The benefits can be transferred by succession on death even without the consent of the Minister. In the case of a licence issued under section 24 there could be no transfer even if the Minister agrees to consent as it would be contrary to section 24(6).

In the present case clause 17 of the licence, prohibiting transfer, was cancelled by the conservator. Clause 17 reads: —

"17. The licensee shall not assign the benefit of this licence or assign transfer charge or part with any right or privilege thereunder without the previous consent in writing of the Government under the hand of the Permanent Secretary to the Minister first had and obtained."

Section 15 states clearly that no right of any description in a Forest Reserve can be acquired except (a) in accordance with the terms of a licence agreement entered into by the Minister or (b) by virtue of a licence. While a licence under section 24 can be issued by the conservator or his representative, a licence agreement can only be entered into by the Minister concerned under section 15. The definitions of "licence" and "licence agreement" under section 2 mentioned previously clarify the difference between the two. In the present case the purported licence agreement does not indicate that it was entered into by the Minister concerned. It is true that one of the signatories is the Setiausaha, Hasil Bumi but he merely countersigned as to one of the conditions. Not surprisingly, the learned judge held that the purported licence agreement was in fact a licence issued under section 24(1) and therefore subject to the provisions of section 24(6). It is undoubtedly a licence in Form I. As such it is not transferable in any manner whatsoever. Consequently, the conservator was wrong to delete or cancel

clause 17. There is nothing in the enactment or rules made thereunder empowering the conservator to override the provisions of section 24(6). In my view, with respect, the learned judge was right and I would uphold his decision. Accordingly, I would dismiss the appeal with costs here and the court below.

Chang Min Tat F.J. (read by Charles Ho J.): The appellant, who was the third plaintiff in the civil action, was the assignee of the forest licence granted to the first defendant. The respondent was similarly an assignee whom the first defendant, the licensee, purported to substitute in place of the appellant. The respondent succeeded in his application to the court to strike out the writ against him on the ground that the transaction between the licensee and the appellant, in other words, the assignment of the licence, was in breach of the law and therefore illegal.

The subject-matter of the dispute concerns a piece of land of some 20,000 acres in extent situated in a forest reserve. A licence to take timber from this area was granted on November 14, 1971 to the first defendant for an expressed period of 10 years. The licence was expressed to commence on November 1, 1971, and to expire on October 31, 1981. It was termed a special licence to take forest produce and to be issued under the Forests Enactment, 1968 and Forests Rules, 1969.

Now, neither in the said Forests Enactment nor in the Forests Rules is there any provision for a special licence. But in the Forests Rules, 1954, by rule 3(2), the conservator may with the previous approval of the Minister charged with responsibility for forests issue "a special licence granting in such form and on such conditions as he may in each case impose and for a period exceeding one year but not exceeding ten years, the sole right to cut or collect and remove all or any specified forest produce on or from any area of Crown land specified therein." An effort was therefore made by the appellant to establish that the "special" licence in question was a licence issued not under, though stated to be, the Forests Rules, 1969 but under the Forests Rules, 1954. There cannot be any substance in this contention as the Forests Enactment, 1968 specifically repeals the Forests Ordinance, 1954 and as a necessary concomitant, the Forests Rules, 1954 must be regarded as having been repealed and to be inapplicable in 1971 when this "special" licence was issued.

So whatever may be the purpose behind such an endeavour, the point in issue remains to be decided by an interpretation of the Forests Enactment, 1968 and the Forests Rules, 1969.

Now, ordinarily, forests reserves should be what they are declared to be. Forest produce should remain inviolate. It is therefore provided under section 20 of the Forests Enactment that certain acts are prohibited and

"20.(a) Any person who

(i) cuts, collects, converts, fells, girdles, marks, lops, removes or taps or injures by fire or otherwise any forest produce;

(ii) negligently causes any damage in felling any tree or in cutting, extracting or removing any forest produce;

....

in a Forest Reserve shall be guilty of an offence and liable to imprisonment for seven years and a fine."

However, the enactment also makes provision for the doing of all such acts, otherwise prohibited, and licences may be issued. By section 24(1), which reads

"24. (1) Subject to the provisions of this Enactment, the Conservator or any person authorized by him in that behalf may issue licences for the doing of all or any of the acts prohibited by section 20 ... of this Enactment upon such conditions and subject to the payment of such fees or royalties (if any) as may be prescribed or as may be specified in such licence."

the conservator or any person authorised by him may therefore issue a licence to take forest produce in a specified area. By sub-section (2), the licence shall be valid for such period as may be specified therein, but by sub-section (3), such specified period "shall not be expressed as being valid for a period exceeding five years and if by mistake or otherwise such licence is expressed to be valid for a longer period or contains no period of validity, shall cease to be valid at the expiration of five years from the date of issue thereof."

The authorisation takes the form of a licence for the taking of forest produce. By Rule 3 of the Forests Rules, 1969, such a licence shall be in one of the forms set out in Schedule III thereof. Form I is a licence to take forest produce generally, Form II a licence to do so free of royalty and Form IIB on prepayment of royalty. Form I specifically states that the authority to take the forest produce is subject to the conditions set out and to the provisions of the Forests Enactment, 1968 and the Forests Rules, 1969.

Such a licence is absolutely not transferable. Sub-section (6) of section 24 is in these absolute terms:

"(6) A licence shall be personable to the holder thereof and shall not be transferable in any manner whatsoever and shall cease to be valid on the death of such holder...."

This court has already held that any purported appointment of an attorney to work the forests in the name of the licensee was a colourable device which was in breach of section 23 (which prohibits the acts listed in section 20, *supra*, but in reference to State land other than a forest reserve) and section 24 and illegal and any claim based thereon could not be enforced: *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.*[3] With respect, I would hold the same view with regard to a breach of sections 20 and 24 in regard to a forest reserve.

It still remains to be considered whether the licence in question is or is not a licence agreement or a licence under section 15 and not a licence under section 20.

Section 15 is in these words:

"15. (1) Save as otherwise provided in this Enactment and notwithstanding the provisions of any other State law, no right of any description in or over a Forest Reserve or any part thereof shall be acquired except by virtue, and in accordance with the terms of, a licence agreement entered into by the Minister or of a licence.

(2) Any licence agreement entered into by the Minister under this section shall be subject to any admitted rights or conceded privileges and any special conditions attaching to the Forest Reserve concerned under the provisions of this Enactment, but subject thereto, where any provision of such licence agreement is inconsistent with any provision of this Enactment compliance with the provisions of such licence agreement shall

be deemed to be compliance with the provisions of this Enactment."

The point is that by section 16 which reads

"16. Notwithstanding anything in this Enactment or in any other written law, no admitted right or conceded privilege shall be transferred by way of grant, sale, lease, charge or other manner, except succession on death, without the written consent of the Minister."

the prohibition against a transfer of the licence is not absolute but may be waived with the written consent of the Minister. This point is connected with the cancellation of clause 17 which generally preserves the official disapproval against transfers. The clause reads as follows:

"Clause 17:

The licensee shall not assign the benefits of this licence or assign transfer or part with any right or privilege thereunder without the previous consent in writing of the Government under the hand of the Permanent Secretary to the Minister first had and obtained."

The cancellation was by a rubber-stamp bearing the word "deleted" and signed obviously, by a comparison of the signatures, by the conservator who issued the licence.

This court has not been advised whether there is any usual form of a licence agreement in use, but it is first to be observed that a licence agreement or a licence under section 15 would be entered into by the Minister in charge of forests. That requirement is missing in the licence this court has to construe. But the matter goes beyond any uncertainty when a comparison is made with Form I in Schedule III of the Forests Rules, 1969. It is beyond doubt and argument a licence in Form I. It is therefore not a licence agreement or a licence issued under section 15 but a licence issued under section 24 of the Forests Enactment, 1968. It is not transferable and the purported deletion of the non-transferable clause 17 by the Government is beyond his powers and is null and of no effect.

With respect therefore, I agree with the learned judge in his conclusions and would dismiss the appeal.

Suffian L.P. concurred.

Appeal dismissed.

Solicitors: *W. K. Loo & Co.; Shelly Yap & Co.*

UNITED OVERSEAS BANK LTD. v. JOO HIN LEONG

[O.C.J. (Mohamed Zahir J.) February 4, 1978]
[Kuala Trengganu — Civil Suit No. 81 of 1970]

Practice and Procedure — Consent judgment — Application for stay of execution — Application made by motion in same suit — Wrong procedure — Special Circumstances — R.S.C., 1957, O. 28 & O. 42 r. 17(b).

The plaintiff had in 1971 obtained a consent judgment against the defendant for the sum of $79,669.49 and interest thereon. Four years later in 1975 the defendant applied by motion for stay of execution of the judgment on the ground that the plaintiff had agreed to allow a deduction of $10,000 from the principal sum and that the plaintiff had agreed to waive interest on the principal sum from 1966 to the date of judgment.

Held: (1) the defendant in this case merely claimed that there was an alleged agreement between him and the plaintiff before the judgment. This did not constitute special circumstances to justify the court in exercising its power under Order 42 rule 17(b) of the Rules of the Supreme Court;

(2) to allow the defendant's application in this case would mean that there would be a permanent stay of execution and this was not the intention of Order 42 rule 17(b);

(3) the defendant should in this case file a fresh suit for a declaration that there was already satisfaction of the judgment of the court and then apply for stay of execution pending determination of the issue.

Cases referred to:-

(1) *Ainsworth* v. *Wilding* [1896] 1 Ch. 673.
(2) *Kinch* v. *Walcott & Ors.* [1929] A.C. 482, 493, 494.
(3) *Kerpa Singh* v. *Bariam Singh* [1966] 1 M.L.J. 38.

CIVIL SUIT.

A. Wilson for the applicant.

C.V. Das for the respondent.

Mohamed Zahir J.: The Defendant is, by way of Notice of Motion, seeking for stay of execution of the Order of this Honourable Court given against him on May 4, 1971. This was a consent order made in Chambers where the defendant was ordered to pay to the plaintiff the sum of $79,669.49 and interest thereon from the 1st day of September, 1970 at the rate of 95 cents per $100 per mensem with monthly rests until judgment and interest at the rate of 6% thereafter to the date of realisation and costs.

After more than four years, the defendant is now saying that the plaintiff's right to call up the balance due on the judgment be stayed. The defendant filed an affidavit dated September 10, 1975 alleging as follows:—

(a) that the plaintiff had agreed to allow a deduction of $10,000 from the principal sum;

(b) that the plaintiff had agreed to waive interest on the principal sum from 1966 to date of judgment.

The plaintiff in their affidavit dated October 28, 1975 affirmed by their Chief Manager and Secretary denied such agreement.

Mr. Das, counsel for the plaintiff, made a preliminary submission that the defendant's action in bringing the application by way of motion in the same suit is wrong in procedure and submitted that the defendant should have filed a separate suit.

The general rule is that a judgment is conclusive and binding on the defendant unless —